No. 80-1534

Clerk, Supreme Court, U.S.
FILED
MAY 20 1981
ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE OCHS,
PETITIONER

vs.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

STEVEN H. GIFIS
ATTORNEY FOR PETITIONER
ONE PALMER SQUARE
PRINCETON, NEW JERSEY 08540
(609) 921-0335

STEVEN H. GIFIS
OF COUNSEL AND
ON THE PETITION

ALAN DEXTER BOWMAN
ON THE PETITION

THE SUPERIOR APPELLATE PRINTING COMPANY
P O BOX 363
CRANBURY, N J 08512
AREA CODE 609
443-4202

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1534

GEORGE OCHS, PETITIONER

V.

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

The Solicitor General misapprehends the thrust of petitioner's claim of a due process violation before this Court. In its brief, the Solicitor General states that the gravamen of petitioner's complaint is simply that materials set forth in psychiatric data which was approximately 12 years old was utilized to underpin the conclusion that petitioner's sentence should not be reduced. The materials indicated that petitioner pre-

viously suffered from a "psychopathic personality with asocial and amoral trends" and an "antisocial personality of moderate severity." (25a). The Solicitor General correctly states that the district court, to petitioner's dismay, considered unreliable data in deciding to deny the motion. The Solicitor General, however, nowhere states in its memorandum that the district court also stated that updated psychological materials "might well have turned the tide in [petitioner's] favor." (45a). Further, the government omits any reference to the fact that only the Court or the United States Attorney had the power to order production of updated materials. Most importantly, it should be emphasized that petitioner requested production of any materials which the court deemed relevant to just disposition of the motion. Correctly stated, it is petitioner's position before this Court that a due process violation of the most egregious character inheres "where a

court denies a motion on the ground that evidence is lacking to which [the court] denied the criminal defendant access." (Petition at page 19).

In our view, it is clear that petitioner was not afforded the form of fair hearing required by the United States Constitution. Indeed, any decision affirming the procedure below will be inconsistent with this Court's concept of due process as it has been espoused in this Court's opinions respecting the Fifth Amendment. A major concern, aside from vindication of clear constitutional rights, is the impact upon petitioner's attempts to adapt himself to a commitment to the system of orderly society should this Court not hear this case. He rightly perceives that he was not accorded fundamental fairness by the district court. In this context, we concede that the conduct of the court below is not typical of justice within the federal courts. Ordinarily, our procedures are fair and our rulings just. Therefore, to that extent, a limited pedagogical

function is to be served by freeing petitioner of the arbitrary and unjust denial of his motion. We understand that the limited nature of the jurisprudential significance of reversal of this aberrant violation militates against consideration by this Court. Nevertheless, we submit that this Court has a clear opportunity in the instant case to serve the end of justice in individual cases. We believe that this clear opportunity is no less than a duty. *

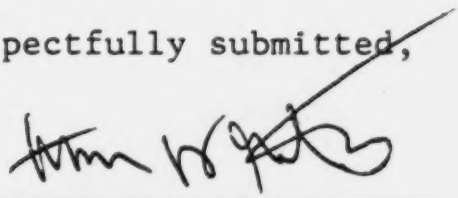
---

* Although we are essentially requesting that this Court vindicate a principle of due process, a fairly technical and objective issue, it is instructive to iterate certain factors relating to petitioner's character and prior record. The government, particularly in the Second Circuit and before the district court, has continually grossly misrepresented petitioner's prior criminal record. He has no record of violent conduct, as the government erroneously proffered to the Second Circuit, and has served substantial periods of time imprisoned for acts which are not presently criminal. Even with respect to the instant offenses, petitioner's convictions are based upon what by today's standards is an unconstitutional search and seizure, viz. a search of a locked brief case absent both probable cause and exigent circumstances. Petitioner needs sustenance for his will to survive and to continue to strive toward rehabilitation. He only asks this Court for an indication that he like other citizens will be accorded his constitutional rights. To petitioner, the fairness of his hearing is as important as the result.

CONCLUSION

There are material omissions in the Solicitor General's memorandum which should not be permitted to obscure the basic violation of petitioner's due process rights stemming from the procedure utilized by the district court and affirmed by the Second Circuit. The district court deprived petitioner of access to certain evidence and then denied his motion because of the lack of that evidence. A violation of due process and fundamental fairness could not be clearer.

Respectfully submitted,



Steven H. Gifis
Attorney for Petitioner

Alan Dexter Bowman
On the Brief

DATED: May 18, 1981